LIBRARY
SUPREME COURT, U. S.

FILED
JAN 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 880

ROBERT A. KENNEDY, as Treasurer of the State of Arizona, ROY L. THORNBRUGH, as Registrar of Contractors of the State of Arizona and GARNER ELECTRIC COMPANY, *Petitioners,*

v.

LOUISE POWELL, Trustee in Bankruptcy of the Estate of Leon Showalter, bankrupt, 1600 West Camelback, Phoenix, Arizona, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the State of New Mexico as Amicus Curiae in Support of Petition for a Writ of Certiorari

BOSTON E. WITT
Attorney General of New Mexico

GEORGE RICHARD SCHMITT
Assistant Attorney General
P. O. Box 2246
Santa Fe, New Mexico

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Interest of the Amicus Curiae	1
Reasons for Granting the Writ	2
Appendix A—The New Mexico Contractors Bonding Law and Agreement Cash Collateral Assignment, Section 67-16-21, N.M. S.A., 1953 Compilation (1966 Interim Supplement)	1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 880

ROBERT A. KENNEDY, as Treasurer of the State of Arizona, ROY L. THORNBRUGH, as Registrar of Contractors of the State of Arizona and GARNER ELECTRIC COMPANY, *Petitioners,*

v.

LOUISE POWELL, Trustee in Bankruptcy of the Estate of Leon Showalter, bankrupt, 1600 West Camelback, Phoenix, Arizona, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the State of New Mexico as Amicus Curiae

The State of New Mexico files this brief as *Amicus Curiae* under sponsorship of its Attorney General pursuant to Rule 42(4), Rules of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

For the reasons set forth below, the State of New Mexico as *Amicus Curiae* urges that the Court grant the Petition of the Arizona State Treasurer, the Arizona Registrar of Contractors and the Garner Electric Company for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment in *Kennedy* v. *Powell,* 366 F. 2d 346 (1966).

REASONS FOR GRANTING THE WRIT

Review of the decision of the Court below in the instant case is of immediate and practical importance to the State of New Mexico in the administration of its Contractors' License Law, Section 67-16-1, through 67-16-21, N.M.S.A., 1953 Compilation, as amended, because:

1. The New Mexico Contractors' License Law contains a bonding provision which is similar to the Arizona Contractors' Bonding Statute which has been interpreted by the United States Court of Appeals for the Ninth Circuit in *Kennedy* v. *Powell, supra.* The New Mexico Contractors' Bonding provision, Section 67-16-21, N.M.S.A., 1953 Compilation (1966 Interim Supplement), is set forth in its entirety in Appendix A, *infra,* pages 1a-3a.

2. The majority decision in the court below is wrong as is clearly shown by Petitioners in their brief. If allowed to stand the decision will defeat the purpose of the New Mexico Legislature in its enactment of Section 67-16-21, *supra,* requiring New Mexico licensed contractors to be bonded or in lieu thereof to post a cash collateral assignment. Such security is expressly required by the legislature for the protection and benefit of:

> "(1) any person damaged as a result of a violation by a licensee or applicant of the Contractors' License Law;
>
> (2) any person damaged as a result of a violation by a licensee of the Uniform Building Code as adopted by the contractors' license board;
>
> (3) any person damaged by a fraud of a licensee or applicant, which fraud has been established in a court of competent jurisdiction, in the execution or performance of a contract. For the purpose of

this subsection, fraud shall include, but not be limited to, the acceptance of payment on a contract without paying to material suppliers a proportionate amount of the payment; and

(4) any employee of the licensee damaged by the licensee's failure to pay wages or fringe benefits."

In this instance, the Ninth Circuit Court of Appeals allowed a Trustee in Bankruptcy to impound for distribution to the general creditors of a bankrupt contractor, a specific sum of money which he deposited, prior to his bankruptcy, with the Arizona State Treasurer for the protection of people, who might be damaged under Arizona law, in a manner similar to New Mexico law, as set forth above. After the deposit was made several persons were damaged by the contractor's actions and under the Arizona bonding statute, they alone were entitled to the contractor's cash collateral, specifically deposited by him for their protection and benefit. To hold otherwise (as the Ninth Circuit has done) obviously destroys their priority and lien granted by Arizona Law. In other words, we have, in this instance . . . "secured creditors [being] deprived of vested rights" . . . as was stated by Judge Koelsch in his dissent to the majority in the *Kennedy* v. *Powell* decision. This decision must be reviewed and reversed, or, as Petitioners point out . . . "manifest injustice" . . . will result.

Respectfully submitted,

BOSTON E. WITT
Attorney General

GEORGE RICHARD SCHMITT
Assistant Attorney General